

WILLIAM H. PULLEN, JR., ET AL.

IBLA 97-171

Decided July 29, 1999

Appeals from decisions of the Acting Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, granting a release of Phase III performance bonds for two surface coal mining operations. Permit Nos. GA-002 and GA-006.

Affirmed.

1. Evidence: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Release--Surface Mining Control and Reclamation Act of 1977: Postmining Land Use: Generally--Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

A decision of OSM granting a request for a Phase III performance bond release will be affirmed where the record supports OSM's determination that all of the applicable reclamation requirements, including those concerning successfully revegetating the land and ensuring that it is capable of supporting the approved postmining land use, have been satisfied, as required by section 519(c)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1269(c)(3) (1994), and 30 C.F.R. § 800.40(c)(3), and the party challenging the release fails to present any persuasive argument or evidence to the contrary.

APPEARANCES: Herbert E. Franklin, Jr., Esq., Trenton, Georgia, for appellants; C. Lee Reeves, Esq., Birmingham, Alabama, for the American Resources Insurance Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

William Helton Pullen, Jr., and other owners of the lands embraced within two coal surface mining permits (Federal Permit Nos. GA-002 and GA-006) in Dade County, Georgia, have appealed from two decisions of the Acting Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), dated January 6, 1997. Those decisions

granted the application of Jackson County Mining Company, Inc. (Jackson), for release of Phase III performance bonds with respect to its two surface coal mining operations, known as the "Pullen No. 1" and "Pullen No. 2" mines. <sup>1/</sup>

This is the most recent in a series of appeals from separate OSM decisions granting approval for Phase I, II, and III bond release for the permits. In response to the initial appeal of Phase I bond release, we referred the case for an evidentiary hearing before an administrative law judge. William Helton Pullen, Jr., 112 IBLA 218 (1989). Subsequently, we affirmed the decision of the administrative law judge, following a hearing, upholding OSM's Phase I release of Jackson's two performance bonds. William H. Pullen, Jr., 132 IBLA 224 (1995). Thereafter, the Board addressed the appeals from the OSM decisions approving Phase II bond release. After a careful review of the record, we affirmed the decision granting Phase II bond release. William H. Pullen, Jr., 143 IBLA 149 (1998).

On July 12, 1996, Jackson applied to OSM for a Phase III release of the performance bonds, which had originally been issued on December 17, 1982, and December 14, 1983. It, thus, sought the final release, pursuant to section 519(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1269(c) (1994), and 30 C.F.R. § 800.40(c), of the remaining corporate surety liability under the bonds. <sup>2/</sup> See 30 C.F.R. § 910.800. These bonds ensure that reclamation of the land within the permits for Jackson's coal mining operations, conducted in the 1980's, complies with the requirements of SMCRA, its implementing regulations (30 C.F.R. Part 816), and the permits (including the approved reclamation plans). See 30 C.F.R. §§ 800.40(a)(3); 910.816.

In his January 1997 decisions, the Acting Director determined that Jackson had "accomplished" all of the reclamation requirements for Phase III performance bond release, with respect to both permitted surface coal mining operations, and was thus entitled to release of the bonds. However, he provided that formal release of the bonds would be stayed pending a decision by the Board in appellants' earlier appeals from OSM decisions which had granted Phase II performance bond releases. He further noted that, in the event of appeals from his Phase III decisions, release of the bonds would be further stayed until the Board rendered a decision on those appeals. As the Board has since affirmed the OSM decisions approving Phase II bond release as noted above, the Phase III bond release decisions are now the only matter pending before us.

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<sup>1/</sup> The appellants are William Helton Pullen, Jr., William Helton Pullen, Sr., Sandra T. Pullen, and Martha Frances Wells Pullen.

<sup>2/</sup> The remaining liability under the two bonds (Nos. BD-400271 (GA-002) and BD-400365 (GA-006)), for which the American Resources Insurance Company, Inc., is the corporate surety, is \$54,450 (GA-002) and \$41,055 (GA-006).

Appellants have submitted a statement of reasons for appeal (SOR) which is virtually identical to that filed in support of the appeal of Phase II bond release, which case was still pending at the time the SOR was filed. As we noted in our decision affirming Phase II bond release:

Many of Appellants' assertions are conclusory in nature (and at least one is speculative), rather than raising matters of fact which would contradict the finding of OSM. Several of the assertions also raise issues which we addressed previously in our Decision affirming, after an evidentiary hearing, the approval of Phase I bond release for the permits. William H. Pullen, Jr., supra. Among those issues, which will not be revisited herein, are the propriety of the revision of the permits and reclamation plans, the contention that topsoil has not been replaced or restored, and the presence of rocks which interfere with pastureland management.

143 IBLA at 151 (Footnote omitted). Other allegations regarding the adequacy of the revegetation of the reclaimed area, including the ability to support the planned postmining use as pastureland and the existence of a vegetative cover in accordance with the approved reclamation plan, as well as charges of uncontrolled erosion, were addressed in our decision affirming Phase II bond release. 143 IBLA at 152-54.

[1] An OSM decision to grant a Phase III performance bond release must initially be supported by an administrative record which demonstrates that OSM properly determined, based on a reasoned analysis of all relevant factors, that the permittee had, at that time, satisfied all of the reclamation requirements for a Phase III release under SMCRA, its implementing regulations (30 C.F.R. Part 816), and the relevant mining permit, as required by section 519(c)(3) of SMCRA, 30 U.S.C. § 1269(c)(3) (1994), and 30 C.F.R. § 800.40(c)(3). Cf. George W. Philip, 141 IBLA 195, 197 (1997), and cases cited therein (Bureau of Land Management (BLM) decisions).

The record in the instant case is sufficient to support OSM's decision to grant Jackson Phase III performance bond releases for its surface coal mining operations under Permit Nos. GA-002 and GA-006. OSM reclamation specialists Ottis Windham and Melvin Stanley, accompanied by appellants and their attorney, inspected the two permit areas on the ground on November 9, 1996, and again on December 10, 1996. They reported that "[a]ll concerns of the landowners were noted and evaluated." (Administrative Record (AR) at 27.) Windham and Stanley specifically assessed, presumably at appellants' instigation, certain matters concerning, among other things, topsoil redistribution, erosion, and vegetative species and ground cover. They determined that Jackson had replaced the topsoil to a depth of from 6 to 8 inches (as demonstrated by holes dug by appellants), repaired and stabilized some areas which had been experiencing erosion, and established a vegetative ground cover over more than 90 percent of the permitted lands. Id. at 28-29. They noted that the vegetation was composed predominantly

of Kentucky 31 Fescue, the approved grass species, which had "exhibited excellent regeneration capabilities." Id. at 29. Finally, Windham and Stanley stated that testing of the soil in January 1995, by a certified professional soil scientist, had revealed that "the present mine soils were producing .15 tons [of vegetation] per acre more under low management practices than the original soils would produce under high management practices." Id.

Based on these inspections and reviewing all of the documents in the record, Windham recommended that a Phase III bond release be granted as to both permit areas. (AR at 31.) The Acting Director concurred in that recommendation on December 19, 1996, and subsequently issued his January 1997 decisions granting the releases. Id.

In reviewing the decision below it must be recognized that, by virtue of the Board's earlier affirmance of OSM's Phase I and II bond release decisions, it has now been finally determined by the Department that Jackson has "complete[d] the backfilling[] [and] regrading" and "established [revegetation]" on the regraded mined lands, in accordance with the approved reclamation plans, and thus the applicable SMCRA and regulatory requirements. 30 U.S.C. § 1269(c)(1) and (2) (1994); see 30 C.F.R. § 800.40(c)(1) and (2); William H. Pullen, Jr., 143 IBLA at 152-54; William H. Pullen, Jr., 132 IBLA at 229-34; Newtex Management Corp., 117 IBLA 380, 384-85 (1991). Nothing in the present record contradicts those determinations. Thus, we can conclude that the permitted lands have already been properly backfilled and regraded and adequate and appropriate revegetation has been established, in accordance with 30 C.F.R. §§ 816.101 through 816.116. In addition, the Department has already finally determined that substitute topsoil (salvaged topsoil and degenerated spoil material) was properly replaced, in accordance with 30 C.F.R. § 816.22. William H. Pullen, Jr., 143 IBLA at 153; William H. Pullen, Jr., 132 IBLA at 229-30. All that remains to be determined, in these respects, is whether, at the time of the Acting Director's January 1997 decisions, adequate and appropriate revegetation has sufficiently taken hold. See 30 U.S.C. §§ 1259(b), 1265(b)(19), and 1269(c)(2) (1994); 30 C.F.R. § 816.116(c); OSM v. Calvert & Marsh Coal Co., Inc., 95 IBLA 182, 189 (1987). OSM has now determined that this has occurred. (AR at 28-29.)

We previously upheld OSM's determination that, at the time of Phase II bond release, the land was capable of supporting the approved postmining land use of pastureland, owing to the success in preparing the land for that use, including removing rocks, eliminating rills and gullies, and successfully revegetating the land with an appropriate grass crop, and thus had satisfied the requirements of section 515(b)(2) of SMCRA, 30 U.S.C. § 1265(b)(2) (1994), and 30 C.F.R. § 816.133. William H. Pullen, Jr., 143 IBLA at 152-54. There is nothing in the record indicating that the situation was any different at the time of Phase III bond release. Rather, the OSM inspectors found that the land had over 90 percent ground cover and was even more productive of vegetation than it would have been prior to mining, thus clearly satisfying 30 C.F.R. § 816.116(b)(1) as well. (AR at 28-29.)

A third party challenging an OSM determination that a surface coal mining permittee is entitled to a Phase III release of a performance bond bears the ultimate burden to prove, by a preponderance of the evidence, that OSM erroneously concluded that the permittee had satisfied all of the applicable reclamation requirements for a release, and was thus entitled thereto. William H. Pullen, Jr., 143 IBLA at 149; William H. Pullen, Jr., 132 IBLA at 228-29. Appellants have failed to satisfy that burden here.

Appellants' SOR sets forth numerous allegations of error concerning OSM's factual determination that Jackson had accomplished all of the reclamation requirements embodied in SMCRA, its implementing regulations (30 C.F.R. Part 816), and the two mining permits, which are necessary to support a Phase III bond release. However, as noted previously, these allegations are conclusory in nature. Appellants never identify specifically how Jackson failed to comply with those requirements, and thus why OSM improperly granted those releases. We, thus, find their arguments insufficient to demonstrate any error in OSM's decisions to grant Phase III bond releases. Burton A. McGregor, 119 IBLA 95, 98 (1991). Moreover, appellants have offered absolutely no evidence in support of their allegations. They have, thus, clearly failed to carry their burden of proof. As we said in Oregon Natural Resources Council, 141 IBLA 387, 392 (1997):

An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice. Kings Meadow Ranches, 126 IBLA 339, 342 (1993).

See Lloyd D. Livesay v. OSM, 112 IBLA 137, 139 (1989) (applying same standard to Board review of appeal from administrative law judge's decision affirming OSM decision).

Finally, appellants have requested a hearing before an administrative law judge, pursuant to 43 C.F.R. § 4.1286, in order to address their various assertions. (SOR at 4.) Since appellants' assertions are conclusory in nature, they fail to give rise to any "issue of fact" which cannot be resolved on the present record without an evidentiary hearing. Hence, we decline to order a hearing. 43 C.F.R. § 4.1286(b); see William H. Pullen, Jr., 143 IBLA at 154; Newtex Management Corp., 117 IBLA at 385; Woods Petroleum Co., 86 IBLA 46, 55 (1986).

To the extent that appellants' arguments have not been expressly or impliedly addressed in this decision, they have been considered and rejected on the ground that they are contrary to the facts and law.

We, therefore, conclude that the Acting Director, in his January 1997 decisions, properly granted Phase III performance bond releases for Jackson's surface coal mining operations under Permit Nos. GA-002 and GA-006 in Dade County, Georgia.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur.

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Gail M. Frazier  
Administrative Judge

